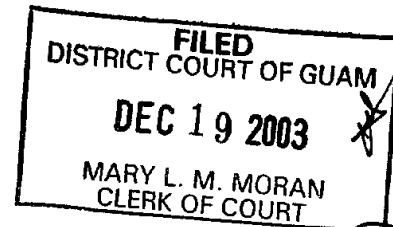


1 **Tony H. Ashtiani**  
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4  
5 **UNITED STATES DISTRICT COURT**

6 **DISTRICT OF GUAM**

7 **Tony H. Ashtiani,** )  
8 **Plaintiff,** ) Civil Case No.: 02-00032  
9 **Vs.** )  
10 **Continental Micronesia Inc,** ) **OPPOSITION TO DEFENDATS MOTION**  
11 **Db, Continental Micronesia,** ) **TO STRIKE UNAUTHENTICATED**  
12 **Continental Airlines,** ) **EXHIBITS. CROSS MOTION TO STRIKE**  
13 **Defendant.** ) **DEFENDANTS EXHIBITS. AFFIDAVIT**  
14 ) **AND DECLARATION OF VINCE DIAZ.**  
15 ) **AFFADAVIT OF TONY ASHTIANI TO**  
16 ) **AUTHENTICATE EXHIBITS ON**  
17 ) **RECORDS.**

14 ) **RULE 56**

15 ) **28. USC 1746**

16  
17  
18  
19 This matter before the Court in reference to defendants Motion to  
20 strike Ashtiani's Exhibits, Defendant here, has provided a vehicle for  
21 plaintiff to submit further affidavit in opposition and opportunity to  
22 authenticate exhibits on record in his opposition to defendants motion  
23 to strike, failing that Rule 56 (e) "The court may permit affidavits  
24 to be supplemented or opposed by depositions, answers to  
25 interrogatories, or further affidavits."

CV. 02-00032

Page 1 of 10

**ORIGINAL**

1 Plaintiff submits further affidavit of Vince Diaz in support of  
2 his claim of defendants' bad affidavit made rule 56 (g), Plaintiff had  
3 also addressed this issue at motion hearing.  
4

5 Prior to filing a motion for Partial summary judgment plaintiff  
6 reviewed the rule 56, and looked at few cases, and noticed a supreme  
7 court case that was frequently cited. "But unlike the Court of  
8 Appeals, we find no express or implied requirement in Rule 56 that the  
9 moving party support its motion with affidavits or other similar  
10 materials *negating* the opponent's claim. On the contrary, Rule 56(c),  
11 which refers to **"the affidavits, if any"** (emphasis added), suggests  
12 the absence of such a requirement. And if there were any doubt about  
13 the meaning of Rule 56(c) in this regard, such doubt is clearly  
14 removed by Rules 56(a) and (b), which provide that claimants and  
15 defendants, respectively, may move for summary judgment **"with or  
16 without supporting affidavits"** (emphasis added). The import of these  
17 subsections is that, regardless of whether the moving party  
18 accompanies its summary judgment motion with affidavits, the motion  
19 may, and should, be granted so long as whatever is before the district  
20 court demonstrates that the standard for the entry of summary  
21 judgment, as set forth in Rule 56(c), is satisfied. Celotex Corp. v.  
22 Catrett 106 S.Ct. 2548 id at 2553  
23  
24  
25

1 Further more, There were many cases that referred to these  
2 languages of "with or without affidavit" and "if any" led plaintiff to  
3 believe of it necessity to even requiring affidavit.  
4

5 "A declaration under penalty of perjury may always be substituted  
6 for a sworn affidavit" See Matthew & Bender forms and 28 USC 1746.  
7

8 Unsworn statement signed under penalty of perjury could be used,  
9 in lieu of sworn statement or affidavit, in support of opposition to  
10 motion to dismiss which was treated as motion for summary  
11 judgment. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.; 28 U.S.C.A.  
§ 1746, *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v.*  
*Medfit Intern., Inc.* 982 F.2d 686

12 Declaration of Vince Diaz, Joe Pangelinan, Ron Roberts, Kathleen  
13 P. Sgambelluri and Mark Williams are all admissible evidence.

14 Declaration which recited that it was made under penalty of perjury  
15 was **admissible** in support of summary judgment motion under  
16 statute permitting unsworn declaration made under penalty of  
perjury to **substitute for sworn affidavit.** 28 U.S.C.A. § 1746.  
*McLaughlin v. Cohen* 686F.Supp.454

17  
18 Pro se plaintiff in his affidavit and his declaration states  
19 under penalty of perjury that the forgoing is true and correct.  
20 "(When pro se civil rights plaintiff properly executed form complaint  
21 which called for declaration in conformity with federal statute  
22 requiring that affiants declare under penalty of perjury that  
23 foregoing statements in form are true, plaintiff's statement of claim  
24 was transformed from "mere allegations" of pleading into "specific  
25 facts" as in evidentiary affidavit and, therefore, plaintiff's failure

1 to proffer evidentiary materials directly in opposition to defendants'  
2 motion for summary judgment, without more, did not mandate entry of  
3 summary judgment in favor of defendants". 42 U.S.C.A. § 1983; 28  
4 U.S.C.A. § 1746. McNeal v. Macht 763 F.Supp. 1458.

5 And even then, defendant had duty to provide plaintiff with notice in  
6 plain English language of all necessary documents and how the formal  
7 contents should be. ("In sum, absent a clear indication that the *pro se*  
8 litigant understands the nature and consequences of Rule 56--as is  
9 required under Vital and which we reiterate today--he or she must be  
10 so informed by the movant in the notice of motion"). *McPherson v.*  
11 *Coombe* 174 F.3d 276.

13  
14 A claim of race discrimination may be established either under  
15 the direct evidence method or the indirect burden-shifting method.  
16 Plaintiff has succeeded in showing evidence that there were other  
17 mechanics that did not have to call supervisor when calling sick See  
18 Vince Diazs' affidavit. In order to establish employment  
19 discrimination under the McDonnell-Douglas burden-shifting test, an  
20 employee must first establish a prima facie case by demonstrating,  
21 among other things, that a similarly situated person outside the  
22 protected class was treated better.

23  
24  
25 A claim of race discrimination may be established in one of two ways--

1 under the direct method or the indirect burden-shifting method. See  
2 Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir.1997).  
3 Accordingly plaintiff supervisors has treated Ashtiani differently and  
4 through direct and circumstantial evidence that the employer decision  
5 was pretext.

6  
7 For Example, In a wrongful discharge of title VII case where the  
8 plaintiff alleges that he or she was discharged for discriminatory  
9 reasons, one source and undisputed fact might be stated as follows:  
10

11  
12 **Source:**

**Undisputed Fact:**

13 Corporate documents shift turn over logs  
Admissible Rule 803(6)

*Vince Diaz Affidavit at 3,4,5*

14 April 03, 2002, Rodriguez calls Ruiz  
15 Exhibit (29)

“Mechanics other than supervisor in the  
maintenance Department took sick call  
Messages from other employees.”

16 May 14, 2002, Martinez calls Saclot  
17 Exhibit (30)

“Message of incoming calls were either noted in  
the shift turn over log, or on the message board or  
passed on verbally to the supervisor on duty.”

18 May 27, 2002, Raqueno calls Therrell  
19 Exhibit (31)

“I have personal knowledge mechanics whom  
called another mechanic for sick calls were not  
considered No-call/ No- Show and were not  
reprimanded. This was in house policy at CMI  
Maintenance Dept.”

22  
23 **Rule 56 (g). Bad affidavit made.** Mckinzie at P 16 “As the IBT Agreement and Continental’s Attendance  
24 policy state, “When reporting an absence an absence from work, an employee must Speak directly to  
25 supervisor .A phone call to non supervisory personal, such as to another mechanic does not constitute  
proper Continental protocol for reporting such absence”.

1 Ashtiani submitting corporate records of (3) individual instances  
2 at different dates of (3) different mechanics calling (3) Non-  
3 supervisory individuals exhibits (29),(30),(31) and affidavit of Vince  
4 Diaz the conclusion is inescapable. "While the qualified witness  
5 testifying as to document sought to be introduced under business  
6 records exception to hearsay rule need not be the person who prepared  
7 the record and need not have personal knowledge of the entries in the  
8 record, the qualified witness must have knowledge of the procedure  
9 under which the records were created. Fed.Rules Evid.Rule 803(6), 28  
10 U.S.C.A.Overton v. City of Harvey 29 F.Supp.2d 894  
11

12  
13 The fact remains that both Ashtiani and Diaz are qualified  
14 witnesses and have knowledge of the procedure under which the records  
15 were created. In other hand McKinzie's affidavit at 16 implying that  
16 in house policy did not apply to Ashtiani. Intent of congress in title  
17 VII is clear that employer provide equal treatment and equality  
18 regardless of race and nationality and creeds.  
19

20 Ron Roberts conversation with James Hammer in Roberts'  
21 declaration is important element because in title VII. (affidavit  
22 describing conversations sufficient in title VII action) See Sarcha v  
23 Sears, Roebuck & Co., 3 F.3d 1035,1041 (7th Cir.1993) Also see as it  
24 has been established that declaration under penalty of perjury is  
25 substitute for affidavit.

1  
2 In re Greenwood Air Crash, 924 F.Supp. 1511, 1514 (S.D.Ind.1995)  
3 ("Production of a document by a party constitutes an implicit  
4 authentication of that document."). Thus, the court finds that all of  
5 the exhibits at issue have been authenticated.) *International Paper*  
6 *Co. v. Androscoggin Energy LLC*. "(Exhibits offered in support of  
7 movant's motion for summary judgment were properly authenticated,  
8 since they were produced in discovery by its opponent)". Fed.Rules  
9 Civ.Proc.Rule 56, 28 U.S.C.A.; Fed.Rules. Evid.Rule 901, 28 U.S.C.A. .  
10

11  
12 Defendants request to strike plaintiff's exhibits is dubious ,as  
13 defendant have produced them through rule 34 production of documents,  
14 in other hand defendant is asking to fight with double edged sword  
15 because Ashtiani is proceeding pro se. plaintiff works very hard  
16 reading the rules and works even harder for his pleadings from what I  
17 can gather by looking up dictionary. Accordingly, defendant need to  
18 understand and engage into facts and understand that pro se litigants  
19 rights are one the most essential elements in constitutently rights.  
20

21 **CROSS MOTION TO STRIKE DEFENDATS' EXHIBITS.**

22  
23 Plaintiff's moves to strike all defendants exhibits that do not  
24 meet the requirement of Fed Rule of Evid 803 and 901 and that do not  
25 have company letter head or logo. "(Interoffice memorandum on company  
letter head properly admissible)" under (Fed Rule Evid. 803 and 901)

CV. 02-00032

1 affidavit is insufficient to support a conclusion that the **email** is a  
2 business record as defined in Rule 803(6). Furthermore, even if the  
3 **email** were admissible as a business record, the document contains  
4 second and third-hand hearsay. Plaintiffs was not even aware of these  
5 emails until after defendant was charged with charge of discrimination  
6 statement negate the likelihood of deliberate or conscious  
7 misrepresentation." Fed.R.Evid. 803 "underlying theory".  
8

9  
10 ("Absence of routineness of these e mails raises many ill  
11 motives and bad faith malice and recklessness on the part of defendant  
12 and that there are no consistency or accuracy in these emails. Under  
13 Rule 803(6), plaintiff is obligated to prove digital signature of  
14 these emails.  
15

16 "(The district court held that the affidavits and **emails** were  
17 inadmissible **hearsay** and that Stevens had the opportunity to depose the  
18 affiants but chose not to do so)" Shipping and Terminal Company v.  
19 JAPAN RAINBOW, II MV 334 F.3d 439  
20

21 Here, defendant had multiple opportunity to depose all affiants  
22 Mckinzie, Herrera, Mendoza, and Ashtiani and has failed to do so and  
23 now is relying on internal emails unworthy of believe which does not  
24 even meet the standards on Fed Rule of evidence because it has no  
25 digital signature and is inconsistence with the name of addresses.



1 790 F.2d 1249 5th Cir.1986 United States v. Malandondo-Rivera there  
2 are hardly any documents of defendant that meet this requirement. It  
3 is not that defendant does not have any 8 and 1/2 by 11 inch company  
4 letter Head papers.

5  
6 Plaintiff assertion in strike of all defendants emails look alike  
7 Exhibits comes from inconsistency of E-mails and that Herrera writes  
8 to himself, Herrera to Herrera, Common man does not do this kind  
9 things unless he was paper trailing. (Authentication can be achieved  
10 through appearance, contents, substance, internal patterns, or other  
11 distinctive characteristics taken inconjunction with circumstances Fed  
12 ,R. Evid 901 (b) (4).

13  
14  
15 There fore, upon close examination of Herrera's notes and emails  
16 it is concluded that they have presented hearesay evidence under rule  
17 802.1 Rule 802: Hearsay is not admissible and that Mckinzie, Herrera,  
18 Mendoza all interest parties in this suit and McKinzie and Hammer are  
19 both director in official capacity are named defendant in this law  
20 suit and that they are authority over Herrera and Mendoza. these  
21 documents were fabricated and are not admissible.

22  
23 ("email on the ground that it appears on its face not to have  
24 been sent and is **unauthenticated**") ... S & S Textiles Intern. v.Steve  
25 Weave, Inc. Mr. McKinzie, Herrera, Mendoza erroneous emails attached

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2 business record as defined in Rule 803(6). Furthermore, even if the  
3 **email** were admissible as a business record, the document contains  
4 second and third-hand hearsay. Plaintiffs was not even aware of these  
5 emails until after defendant was charged with discrimination by EEOC.  
6 negate the likelihood of deliberate or conscious misrepresentation."  
7 Fed.R.Evid. 803 "underlying theory".  
8

9  
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23 now is relying on internal emails unworthy of believe which does not  
24 even meet the standards on Fed Rule of evidence because it has no  
25

1 digital signature and is inconsistence with the name of addresses.  
2 Memos signed during EEOC investigation after the fact are inadmissible  
3 dated January 24, 2002.( 8 Months after Ashtiani's termination) these  
4 documents have offered for anything other than the truth asserted  
5 therein.

6  
7 Accordingly, Plaintiff moves to strike defendants Exhibits  
8 E,F,J,K, (L(2) EACH) ,M,N, (Q (2) EACH) in defendants Motion for summary  
9 judgment.  
10

11  
12 **Respectfully submitted,**

13  
14 This 19<sup>TH</sup> day Of December 19, 2003.

15  
16 

17 Tony H. Ashtiani

18 Pro se  
19  
20  
21  
22  
23  
24  
25